

August 15, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20544

Re: MB Docket No. 05-49
Written *Ex Parte* Filing

Dear Ms. Dortch:

On July 28, 2005, DIRECTV filed a written *ex parte* communication in the above-referenced docket in which it misstated the position of the National Association of Broadcasters (“NAB”) and the ABC, CBS, FBC, and NBC Television Affiliate Associations (“Network Affiliates”) with respect to the “equivalent bandwidth” and “entire bandwidth” provisions in the Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”). DIRECTV stated that the broadcasters were advocating a “moment-by-moment equivalent bandwidth requirement.”¹ This is *not* the position that NAB and Network Affiliates have advocated.

NAB and Network Affiliates have consistently argued that the “equivalent bandwidth” and “entire bandwidth” requirements in 47 U.S.C. § 340(b)(2)(B) are “intended to prevent satellite carriers from using technological means to *discriminate* against local digital signals vis-à-vis out-of-market significantly viewed digital signals.”² With respect to this non-

¹ Letter from Michael Nilsson to Marlene H. Dortch (July 28, 2005), at 2; *see also id.* (“Some broadcasters have therefore suggested . . . a requirement to retransmit local broadcasters’ equivalent bandwidth on a moment-by-moment basis . . .”).

² Joint Comments of NAB and Network Affiliates, MB Docket No. 05-49 (Apr. 8, 2005), at 18 (emphasis added).

discrimination principle embodied in SHVERA, NAB and Network Affiliates argued in their joint comments in this proceeding that discrimination “must be prohibited” “with regard to how local and distant signals are retransmitted during different *dayparts*, especially the most important dayparts such as prime time and prime access.”³ In their joint reply comments, NAB and Network Affiliates made the same point: “[T]he satellite carrier must either determine the local station’s bandwidth requirements, statistically averaged, and provide no more bandwidth, statistically averaged, for the distant significantly viewed signal, at least as to each *daypart*, or, in the alternative, retransmit the local station’s entire bandwidth.”⁴

In an *ex parte* notice filed on July 18, 2005, NAB and Network Affiliates stated that “technology and equipment currently exists that permits satellite carriers to determine on a moment-by-moment basis whether a local station is broadcasting a high definition (HD) programming stream or one or more standard definition (SD) programming streams and whether a significantly viewed distant station is broadcasting an HD stream or one or more SD streams and to tailor the ‘equivalent bandwidth’ requirement of the statute accordingly.”⁵

Consequently, NAB and Network Affiliates have stated that the technology exists that permits satellite carriers to determine on a “moment-by-moment” basis the bandwidth requirements of local and out-of-market significantly viewed stations but that satellite carriers, in order not to violate the non-discrimination principle of SHVERA, must provide equivalent bandwidth at least as to each “daypart.”

NAB and Network Affiliates suggested the “daypart” requirement in their original filing in the spirit of compromise. Generally, dayparts within the television industry are divided into the following:

	All Time Zones Other Than Central Time Zone	Central Time Zone
Early Morning	5 a.m. – 9 a.m.	5 a.m. – 9 a.m.
Mid Morning	9 a.m. – 12 noon	9 a.m. – 12 noon
Early Afternoon	12 noon – 3 p.m.	12 noon – 3 p.m.
Early Fringe	3 p.m. – 5 p.m.	3 p.m. – 5 p.m.

³ Joint Comments of NAB and Network Affiliates, MB Docket No. 05-49 (Apr. 8, 2005), at 22 (emphasis added).

⁴ Joint Reply Comments of NAB and Network Affiliates, MB Docket No. 05-49 (Apr. 29, 2005), at 9 (emphasis added).

⁵ Letter from Wade H. Hargrove to Marlene H. Dortch (July 18, 2005), at 1-2. The letter was submitted in response to arguments by DirecTV that the technology did not exist to allow it to determine “equivalent bandwidth” requirements. DirecTV, it should be noted, has offered no engineering or technical support for its argument.

Evening News	5 p.m. – 7 p.m.	5 p.m. – 6:30 p.m.
Access	7 p.m. – 8 p.m.	6:30 p.m. – 7 p.m.
Prime Time	8 p.m. – 11 p.m.	7 p.m. – 10 p.m.
Late News	11 p.m. – 11:30 p.m.	10 p.m. – 10:30 p.m.
Late Night	11:30 p.m. – 1 a.m.	10:30 p.m. – 1 a.m.
Overnight	1 a.m. – 5 a.m.	1 a.m. – 5 a.m.

If the Commission should conclude that in terms of administrative compliance a “clock hour” determination (*i.e.* hour by hour) of equivalent bandwidth requirements would be simpler, more appropriate or more in keeping with Congressional intent, then NAB and Network Affiliates would endorse that determination.

DIRECTV may claim that the parade of horrors that it sets forth in its July 28 letter applies regardless of whether the equivalent bandwidth requirement is interpreted to apply on a moment-by-moment basis or on a daypart basis. But what DIRECTV is attempting to do is to urge the Commission to read the equivalent bandwidth requirement out of the statute. This the Commission cannot do. In fact, the Commission has already correctly recognized that “if the local network station is broadcasting in multicast format, and the significantly viewed network affiliate is broadcasting in HD format, the satellite carrier may carry the HD signal of the significantly viewed network affiliate under the ‘equivalent bandwidth’ requirement, *provided that it carries the local network station’s multicast signals.*”⁶ The Commission’s conclusion is fully in accord with congressional intent:

Section 340(b)(2)(B) prevents the satellite operator from retransmitting a local affiliate’s digital signal in a less robust format than a significantly viewed digital signal of a distant affiliate of the same network, such as by down-converting the local affiliate’s signal but not the distant affiliate’s signal from high-definition digital format to analog or standard definition digital format. Section 340(b)(2)(B)(i) speaks of “equivalent bandwidth” to recognize, for example, that a local affiliate may be *multicasting* while a distant affiliate of the same network may be broadcasting in high-definition, and to ensure that the local affiliate’s *choice to multicast* does not prevent the satellite operator from retransmitting a significantly viewed signal of a distant affiliate of the network that chooses to broadcast in high-definition.⁷

⁶ *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, Notice of Proposed Rule Making, FCC 05-24, at ¶ 44 (emphasis added).

⁷ H.R. REP. 108-634 (2004), at 12 (emphases added).

There is no question, then, that Congress anticipated that a local station may choose to multicast and that, to satisfy the non-discrimination principle embodied in the “equivalent bandwidth” requirement, it is a requirement that the satellite carrier retransmit those multicast programming streams if the satellite carrier desires to retransmit a distant signal in HD format.

DIRECTV’s claims about the costs of satisfying the congressionally-mandated “equivalent bandwidth” requirement are irrelevant. Congress could have cabined the “equivalent bandwidth” requirement with limiting language such as “to the extent the Commission determines the requirement may be inexpensive.” But Congress did not so. Congress did not intend for satellite carriers to disadvantage local stations in allowing satellite carriers to import out-of-market significantly viewed stations. As NAB and Network Affiliates stated in their joint reply comments:

[S]atellite carriers should not expect to receive all of the financial and competitive benefits of the significantly viewed provisions without expenditure. The compulsory copyright license confers a distinct benefit on satellite carriers and allows them to compete more effectively with cable operators. Like all compulsory licenses, the Section 119(a)(3) license, which permits *copyright royalty-free* satellite carriage of significantly viewed signals, comes with limitations and conditions. Moreover, SHVERA *does not compel* satellite carriers to retransmit significantly viewed signals; satellite carriers may choose to do so on their own volition, and they may charge their subscribers for the service. This scheme does not mean, nor was it intended, that satellite carriers can enjoy the benefits of their new compulsory license without strict adherence to its limitations and conditions. This is particularly true where a failure of such adherence would result in local broadcast stations suffering discrimination in contravention of the statute just because it is easier or cheaper for a satellite carrier to operate in a fashion that harms the local station, even if unintentionally.⁸

⁸ Joint Reply Comments of NAB and Network Affiliates, MB Docket No. 05-49 (Apr. 29, 2005), at 11-12.

In accordance with 47 C.F.R. § 1.1206, a copy of this letter is being filed electronically in the relevant docket. If there are any other questions concerning this matter, please contact the undersigned.

Sincerely,



Marsha J. MacBride
Benjamin F.P. Ivins
National Association of Broadcasters

/s/

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cc: Ms. Eloise Gore